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**Before the**

# Federal Communications Commission

**Washington, DC 20554**

FILED/ACCEPTED

APR 11 2007

Federal Communications Commission
Office of the Secretary

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| In the Matter of: | ) | |
| | ) | |
| Platinum Television Group, Inc. | ) | CG Docket No. 06-181 |
| | ) | CSR-CC-0236 |
| Video Programming Accessibility | ) | |
| | ) | |
| Petition for Exemption of Closed Captioning Requirements | ) | |
| | ) | |

To: Office of the Secretary

## MOTION TO STRIKE AND PRECAUTIONARY REPLY

Platinum Television Group, **Inc.** ("Platinum"), by counsel, herby files this Motion to Strike and Precautionary Reply. On January 4,2006, Platinum filed a petition with the FCC requesting that pursuant to Section 79.1 of the Rules it be exempt from the requirement of the FCC's closed captioning rules.

On November 7,2006, the FCC placed **494** petitions for exemption, including Platinum's Petition, on public notice. Oppositions to the Petition were due by November 27, 2006. A coalition of hearing advocacy groups requested a 120-day extension of time in which to file oppositions against the parties seeking exemption from the FCC's closed captioning rules. By Public Notice, DA 06-2329, released November 21,2006, the FCC granted the Motion for Extension of Time.

On March 2,2007, Telecommunications for the Deaf and Hard of Hearing, Inc. ("TDI"), National Association for **the** Deaf ("'AD"), Deaf and Hard of Hearing Consumer Advocacy Network ("DHHCAN), Hearing Loss Association of America ("HLAA"), Association of Late-Deafened Adults, Inc. ("ALDA"), American Association of People with Disabilities ("AAF'D'),

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and California Coalition of Agencies Serving the Deaf and Hard of Hearing ("CCASDHH") (collectively the "Advocacy Groups") filed an Opposition to Platinum's Petition for Exemption.

**The Advocacy Groups are Not Interested Persons Within the Meaning of the FCC's Rules.**

Section 79.1 (f) (6) of the FCC's rules provides that "any interested person may file comments or oppositions to the petition" for exemption.[1] The Advocacy Groups are not interested persons within the meaning to the FCC rules and the Administrative Procedure Act.[2] The Advocacy Groups do not allege that the FCC's grant of the above captioned Petition in any way would injure them or any of their members. Nor do they claim that any member regularly watches Platinum's programs. The Advocacy Groups have not shown how the FCC's grant of the Petition for Exemption would cause them or their members harm. Without a showing of an injury-in-fact, the Advocacy Groups are not "interested persons." Therefore, they do not have standing to participate in this proceeding.

The Administrative Procedure Act provides that an "interested person" may appear before an agency for the presentation, adjustment, or determination of an issue. 5 U.S.C.A. § 555(b). The Court of Appeals has held that the injury-in-fact rule for standing of *Sierra Club v. Morton*, 405 U.S. 727, 733, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972) covers the "interested person" language of the Administrative Procedure Act. *Trustees for Alaska v. EPA*, 749 F.2d 549, 554 (9th Cir. 1984) (adopting the analysis in *Montgomery Environmental Coalition v. Costle*, 207 App. D.C. 233, 646 F.2d 568, 578 (D.C. Cir. 1980)). *Compare, In the Matter of Cox Communications, Inc.*, 14 FCC Rcd 11716

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[1] 47 C.F.R. §79.1 (f)(6)
[2] 5 U.S.C.A. § 555(b).

(1999) (Petitioners are not "interestedpersons" outside of the area where they are cable subscribers.)

*The "irreducible* constitutional minimum" ***for*** standing is that the appellant was injured in fact, that its injury was caused by the challenged conduct, and that the injury would likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555,560-61, 119 L. Ed. 2d 351, 112 **S.** Ct. 2130 (1992); *Microwave Acquisition Corp. v. FCC*, 330 U.S. App. D.C. 340,145 F.3d 1410,1412 (D.C. Cir. 1998). Associations, such as the Advocacy Groups, have standing to sue on behalf of their members only if (1) at least one of the members would have standing to sue in his own **right,** (2) the interest the association seeks to protect is germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member participate in the lawsuit. *Hunt v. Washington State Apple Adver. Comm'n*, 432 **U.S.** 333, 343 (1977).

Generally, the Commission accords party in interest standing to a petitioner that demonstrates either residence in the station's service area, or that the petitioner listens to or views the station regularly.[3] *Chet-5 Broadcasting, L.P.* 14 FCC Rcd 13041 (1999). In this case, Advocacy Groups should have demonstrated that at least one of their members resides in the service area **of** a station that broadcasts Platinum's programming, and that the member regularly views the programming. The Advocacy Groups have not provided the statement of a single member who claims to be aggrieved or adversely affected by the grant of Platinum's Petition for Exemption of the Closed Captioning rules. Since the Advocacy Groups lack standing to oppose Platinum's Petition, the Commission should strike the Advocacy Groups' Opposition without consideration.

[3] **47 U.S.C.** §309 (d)(1) **("Any party** in interest **may** file with the Commission **a** petition to deny. . .")

## Procedural **Defects**

The Advocacy Groups' Opposition has numerous procedural defects. Section 1.49(a) of the Commission's Rules provides that all pleadings must be double-spaced. The Advocacy Groups' Opposition is single-spaced. Further, had the Advocacy Groups properly spaced the Opposition it would have exceeded ten double spaced pages. Section 1.49(b) and (c) provide that all pleadings exceeding ten pages shall contain a table of contents and a summary. The Advocacy Groups' Opposition contains neither a table of contents nor a summary. These procedural defects provide a separate and independent reason for striking the Advocacy Groups' defective Opposition.

## Precautionary **Reply**

A review of the filings made by the Advocacy Groups in CG Docket No. 06-181 shows that the Advocacy Groups filed numerous cookie-cutter, one-size-fits-all pleadings. In the case of Platinum, the Advocacy Groups accepted Platinum's showing that it only purchases inexpensive airtime during fringe broadcast periods. The Advocacy Groups further do not challenge Platinum's showing that the cost of closed captioning per half hour would exceed the cost of the program time purchased. When Platinum filed its Petition for Exemption, it was not represented by counsel and was unfamiliar with the showing required by the Commission's rules. Platinum has now prepared a supplement in the form of a Declaration from Paul D. Scott, President and C.E.O. of Platinum and New Line Media Solutions, Inc. ("NLM"), attached hereto as Exhibit 1. As Mr. Scott states in his declaration,

> [Platinum] and **NLM** produce, for the benefit of advertisers, half-hour program length commercials. These infomercials advertise a diverse range of products and

services. *An* advertiser pays [Platinum] or NLM to have its product or service profiled within one of our shows. . .

Each month [Platinum] and NLM create approximately 85 unique 30-minute programs, which then air on various broadcast stations and cable television channels. [Platinum] and NLM purchase the airtime directly from the television station, the cable system operator or an independent media discount brokerage agency. The airtime purchased is generally in the early morning fringe day-parts. Our advertisers' requirements and broadcast budgets do not permit us to purchase premium airtime slots. As a result, these programs tend to have very low viewership. Again keeping with our advertisers' budget requirement, most of the airtime purchased for our programs cost, on average, **$300** per 30 minute paid program block.

The cost of outsourcing closed captioning is approximately $350 to $400 per program. Since we would need to caption approximately 85 shows each month, closed captioning would cost upwards of **$34,000 per month,** obviously an enormous expense for a small business. Alternatively, purchasing the equipment necessary to closed caption programs in-house, which would then require the hiring of additional personnel to operate the equipment and transcribe the shows, would likewise be prohibitively even more expensive in salaries and equipment/operational expense as well.

Our clients are sophisticated consumers of advertising. They understand that in purchasing advertising they have many choices. They choose to work with us to supplement their existing advertising campaigns which often include print, radio, internet, trade shows, product placement, billboards, and in-flight advertising, to name a few. We compete with other advertising media for our business. Rising production costs diminish the value of our productions. Increasing costs, by requiring closed captioning, will only result in advertisers moving their advertising dollars to other less expensive venues, thus allowing them to receive the similar advertising exposure at a lower price. We will lose customers and the television stations we purchase time from will lose revenues, a situation, which will serve neither party's best interests.

> Nor, for the reasons discussed above, we cannot pass the cost of closed captioning to our clients. They would simply move their advertising dollars to less expensive advertising venues, such as print or radio. Requiring [Platinum] and NLM to caption each program would place undue burden on our production companies, and would certainly result in the loss of many if not most of our advertising clients. For example, a [Platinum] advertiser, Nuvim, producer of a healthy dietary beverage, routinely purchases radio, newspaper and magazine advertising. Should the cost of closed captioning be added to our other production costs, Nuvim would no longer purchase television advertising from [Platinum] and would transfer its advertising budget from television to other venues.

Platinum has clearly demonstrated that requiring it to close caption 85 infomercials per month would result in an undue financial burden. Platinum has further demonstrated that it cannot pass on the cost of closed captioning to its advertisers or program distributors. Simply stated the advertisers would transfer their marketing efforts to other less expensive venues such as print or radio. The television stations Platinum purchases time from will not pay for closed captioning. For them to do so would result in them paying more for the cost of closed captioning then they can charge for a half-hour of programming time. To require Platinum to close caption each infomercial it produces will place an undue burden on Platinum and will only result in the migration of Platinum client's to other less expensive media and the loss of revenue to the television and cable systems from which Platinum purchases airtime. Accordingly, the FCC should grant its Petition for exemption of Section 79.1 of the FCC's rules.

## Conclusion

The Advocacy Groups lack standing to file an Opposition to Platinum's Petition for Exemption. Additionally, their pleading contains numerous procedural errors, Accordingly, FCC should dismiss the Advocacy Groups' Opposition without consideration.

Even if the Commission should consider the Advocacy Groups' Opposition, it falls far short of rebutting Platinum's showing. The Advocacy Groups have determined that no programmer, regardless how small or how deserving, should ever be granted an exemption. It appears that the Advocacy Groups have challenged each of the 494 petitions for exemption listed in the FCC's November 7,2006 Public Notice. Thus, the Advocacy Groups would rather put hundreds of small program producers out of business, rather than concede that occasionally there is a need for an exemption of the Commission's rules. The FCC should not countenance such shameful and selfish conduct. The Advocacy Groups' Opposition, to the extent the FCC considers it at all, should be summarily denied.

Respectfully submitted,

**PLATINUM TELEVISION GROUP, INC.**

By Arthur V Belendiuk

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Its Attorney

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Suite 301
Washington, DC 20016

(202) 363-4559

April 11,2007

# EXHIBIT 1

## DECLARATION

I, Paul D. Scott, declare under penalty of perjury that the following information is true and correct.

I am the President and C.E.O. of Platinum Television Group, Inc. ("PTG") and New Line Media Solutions, Inc. ("NLM").

PTG and NLM produce, for the benefit of advertisers, half-hour program length commercials. These infomercials advertise a diverse range of products and services. An advertiser pays PTG or NLM to have its product or service profiled within one of our shows (sample titles and airtimes listed below.) Each advertiser receives anywhere from 2 to 30 minutes of airtime within a half hour show.

PTG and NLM produce programs in an advertorial style, with each advertiser playing a material role in the script development and production of their segment of the program, including approvals of creative ideas, product shots, company representative interviews, and customer testimonials.

Each month PTG and NLM create approximately 85 unique 30-minute programs, which then air on various broadcast stations and cable television channels. PTG and NLM purchase the airtime directly from the television station, the cable system operator or an independent media discount brokerage agency. The airtime purchased is generally in the early morning fringe day-parts. See below for samples of current airtimes/stations. Our advertisers' requirements and broadcast budgets do not permit us to purchase premium airtime slots. As a result, these programs have very low viewership. Again keeping with our advertisers' budget requirement, most of the airtime purchased for our programs cost, on average, $300 per 30 minute paid program block.

The cost of outsourcing closed captioning is approximately $350 to $400 per program. Since we would need to caption approximately 85 shows each month, closed captioning would cost upwards of $34,000 per month, obviously an enormous expense for any small business. Alternatively, purchasing the equipment necessary to closed caption programs in-house, which would then require the hiring of additional personnel to operate the equipment and transcribe the shows, would likewise be prohibitively even more expensive in terms of salaries and equipment/operational expenses, as well.

Our clients are sophisticated consumers of advertising. They understand that in purchasing advertising they have many choices. They choose to work with us to supplement their existing advertising campaigns which often include print, radio, internet, trade shows, product placement, billboards, and in-flight advertising, to name a few. We compete with other advertising media for our business. Rising production costs diminish the value of our productions. Increasing costs, by requiring closed captioning, will only result in advertisers moving their advertising dollars to other less expensive venues, thus allowing them to receive the similar advertising exposure at a lower price. We will lose customers and the television stations we purchase time from will lose revenues, a situation, which will serve neither party's best interests.

Nor, for the reasons discussed above, we cannot pass the cost of closed captioning to our clients. They would simply move their advertising dollars to less expensive advertising venues, such as print or radio. Requiring PTG and NLM to caption each program would place undue burden on our production companies, and would certainly result in the loss of many if not most of our advertising clients. For example, a PTG advertiser, Nuvim, producer of a healthy dietary beverage, routinely purchases radio, newspaper and magazine advertising. Should the cost of closed captioning be added to our other production costs, Nuvim would no longer purchase television advertising from PTG and would transfer its advertising budget from television to other venues.

Paul D. Scott
President
Platinum Television Group, Inc.
New Line Media Solutions, Inc.

**Program Titles:**

New Home Journal
Today's Family
Business & Beyond
Great Taste
Pulse on America
Health Forum
Competitive Edge

**Sample Airtimes:**

| | | | | | |
|---|---|---|---|---|---|
| Business 8 Beyond | Minneapolis-St. Paul | Friday | 2/2 | 6:30 AM | KSTC – TV45 |
| Business & Beyond | Minneapolis-St. Paul | Friday | 2/9 | 6:30 AM | KSTC – TV45 |
| Business 8 Beyond | Minneapolis-St. Paul | Friday | 2/16 | 6:30 AM | KSTC – TV45 |
| Business & Beyond | Minneapolis-St. Paul | Friday | 2/23 | 6:30 AM | KSTC – TV45 |
| Business & Beyond | Kansas City | Monday | 2/5 | 6:00 AM | KCTV5 News KSMO-TV |
| Business & Beyond | Kansas City | Monday | 2/12 | 6:00 AM | KCTV5 News KSMO-TV |
| Business & Beyond | Kansas City | Monday | 2/19 | 600 AM | KCTV5 News KSMO-N |
| Business & | Kansas City | Monday | 2/26 | 6:00 | KCTV5 News KSMO-TV |

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|---|---|---|---|---|---|
| Beyond | | | | AM | |
| Business & Beyond | Pittsburgh | Sunday | 2/4 | 6:00 AM | Pittsburgh Cable News Channel |
| Business & Beyond | Pittsburgh | Sunday | 2/11 | 6:00 AM | Pittsburgh Cable News Channel |
| Business & Beyond | Pittsburgh | Sunday | 2/18 | 6:00 AM | Pittsburgh Cable News Channel |
| Business & Beyond | Pittsburgh | Sunday | 2/25 | 6:00 AM | Pittsburgh Cable News Channel |
| Business & Beyond | Mobile-Pensacola | Sunday | 214 | 7:00 AM | WFGX |
| Business & Beyond | Mobile-Pensacola | Sunday | 2/11 | 7:00 AM | WFGX |
| Business & Beyond | Mobile-Pensacola | Sunday | 2/18 | 7:00 AM | WFGX |
| Business & Beyond | Mobile-Pensacola | Sunday | 2/25 | 7:00 AM | WFGX |
| Competitive Edge | Tulsa | Saturday | 2/3 | 7:30 AM | ESPN2 Cox Cable Tulsa |
| Competitive Edge | Tulsa | Saturday | 2/10 | 7:30 AM | ESPN2 Cox Cable Tulsa |
| Competitive Edge | Tulsa | Saturday | 2/17 | 7:30 AM | ESPN2 Cox Cable Tulsa |
| Competitive Edge | Tulsa | Saturday | 2/24 | 9:oo AM | ESPN2 Cox Cable Tulsa |
| Competitive Edge | Tulsa | Saturday | 3/3 | 7:30 AM | ESPN2 Cox Cable Tulsa |
| Competitive Edge | Nashville | Saturday | 2/3 | 7:30 AM | ESPN2 Nashville, TN Comcast Cable |
| Competitive Edge | Nashville | Saturday | 2/10 | 7:30 AM | ESPN2 Nashville, TN Comcast Cable |
| Competitive Edge | Nashville | Saturday | 2/17 | 7:30 AM | ESPN2 Nashville, TN Comcast Cable |
| Competitive Edge | Nashville | Saturday | 2/24 | 9:oo AM | ESPN2 Nashville, TN Comcast Cable |
| Competitive Edge | Los Angeles (Charter) | Saturday | 3/10 | 5:30 AM | ESPN2 Los Angeles Charter Cable |
| Great Taste | Charlotte | Saturday | 213 | 6:00 AM | WAXN-N Action News |
| Great Taste | Charlotte | Saturday | 2/10 | 6:00 AM | WAXN-N Action News |
| Great Taste | Charlotte | Saturday | 2/17 | 6:00 AM | WAXN-N Action News |
| Great Taste | Charlotte | Saturday | 2/24 | 6:00 AM | WAXN-N Action News |
| Great Taste | Phoenix | Saturday | 2/3 | 6:00 AM | KAZ-N |
| Great Taste | Phoenix | Saturday | 2/10 | 6:00 AM | W-N |
| Great Taste | Phoenix | Saturday | 2/17 | 6:00 AM | KAZ-TV |
| Great Taste | Phoenix | Saturday | 2124 | 6:00 AM | KAZ-TV |
| Great Taste | Boston-Hartford-Springfield | Saturday | 2/3 | 6:30 AM | NECN8 –Comcast Network New England |
| Great Taste | Boston-Hartford- | Saturday | 2/10 | 6:30 | NECN8 –Comcast |

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|---|---|---|---|---|---|
| | Springfield | | | AM | Network New England |
| Great Taste | Boston-Hartford-Springfield | Saturday | 2/17 | 6:30 AM | NECNB–Comcast Network New England |
| Great Taste | Boston-Hartford-Springfield | Saturday | 2/24 | 6:30 AM | NECNB–Comcast Network New England |
| Today's Family | Detroit | Friday | 2/2 | 7:30 AM | WPXD ION (formerly PAX-TV) |
| Today's Family | Detroit | Friday | 2/9 | 7:30 AM | WPXD ION (formerly PAX-TV) |
| Today's Family | Detroit | Friday | 2/16 | 7:30 AM | WPXD ION (formerly PAX-TV) |
| Today's Family | Detroit | Friday | 2/23 | 7:30 AM | WPXD ION (formerly PAX-TV) |
| Today's Family | Buffalo | Wednesday | 2/14 | 7:00 AM | WPXJ ION (formerly PAX-TV) |
| Today's Family | Buffalo | Wednesday | 2/21 | 7:00 AM | WPXJ ION (formerly PAX-TV) |
| Today's Family | Grand Rapids | Thursday | 2/15 | 7:00 AM | WZPX ION (formerly PAX-TV) |
| Today's Family | Grand Rapids | Friday | 2/23 | 7:00 AM | WZPX ION (formerly PAX-TV) |
| Today's Family | Phoenix | Tuesday | 2/27 | 6:00 AM | KPPX ION (formerly PAX-TV |
| Today's Family | National | Thursday | 2/22 | 6:00 AM ET & PT | W.E. -Women's Entertainment |

## CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, a secretary in the law office of Smithwick & Belendiuk, P.C., do hereby certify that a copy of the foregoing "Motion to Stroke and Precautionary Reply" was mailed by First Class **U.S.** Mail, postage prepaid, this 11th day of April, 2007 to the following:

Paul **O.** Gagnier, Esquire
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Sherry L. Schunemann

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